

# Toward Labor-Management Cooperation in Government\*

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## I. INTRODUCTION

In the preface to *U.S. Labor Law and the Future of Labor-Management Cooperation*, the U.S. Department of Labor defined the purpose and scope of its study of legal impediments to labor-management cooperation. It stated:

Potential conflict between current Federal labor laws and labor-management cooperative efforts has led the U.S. Department of Labor to embark on a study, using its own resources and inviting the assistance of outside experts, to review the nation's labor laws and collective bargaining traditions and practices that may inhibit improved labor-management relations. The study is designed to assess whether the existing framework impedes, or, indeed, totally bars, many of the cooperative efforts the Department is encouraging and publicizing; and, if so, whether, through interpretation or modification, the laws can be made to support both the ingredients and the goals of labor-management cooperation rather than conflict with them.<sup>1</sup>

An examination of the labor laws, collective bargaining traditions, and practices in state and local government is necessary to accomplish these stated objectives. While analogous to the private sector framework in many respects, the public sector has evolved its unique labor laws and collective bargaining traditions. These laws and traditions vary with each jurisdiction. Moreover, civil service laws and other regulations add a dimension to the public sector framework that warrants independent examination. In addition, state and local government employers and unions have become increasingly interested in cooperative approaches to labor-management relations. Indeed, eighteen major national-level public employer and union organizations concerned with labor-manage-

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1. See generally BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEPT. OF LABOR, *U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION* (BLMR 104, 1988). See also BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEPT. OF LABOR, *FIRST INTERIM REPORT* (BLMR 113, 1987) on the same subject, as well as Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 *LAB. L.J.* 595 (1986).

ment relations in state and local government, in cooperation with the U.S. Department of Labor and the Federal Mediation and Conciliation Service, have joined together in the formation of the State and Local Government Labor-Management Committee.<sup>2</sup> This committee, from its initial meeting in December 1985, has committed itself to the promotion of cooperation between labor and management. Seven states which have significant collective bargaining legislation have been selected for the committee's initial outreach efforts.<sup>3</sup> The committee is working with its constituent organizations in each state to develop a statewide effort to encourage and assist in the development and implementation of cooperative labor-management efforts. In a statement of purpose and objectives,<sup>4</sup> the committee members "agree to promote labor-management cooperation in state and local governments," and further "agree that labor-management cooperation offers the potential for increased worker satisfaction, higher productivity, and more effective service to the public." The organizations recognize that "involvement of employees in the decisions that affect them can do much to improve the quality of the decisions made, the fairness, both real and perceived, of these decisions, and the workers' sense of contribution to the organization."

The American Federation of State, County and Municipal Employees (AFSCME) has resolved to "support the use of joint Labor-Management Committees," so long as there are appropriate safeguards for the Union, including the following:

- (1). The initial establishment of the committee should be for a specified period of time during which the work of the committee should be evaluated in accord with a built-in review process to determine its usefulness;
- (2). The appointment of people to the committee who are responsible for bargaining and administering the collective bargaining agreement, thus adding knowledge, respect and power to the process; and,
- (3). An initial agreement that the committee is not a substitute for collective bargaining, and agreements arising out of the committee are advisory for

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2. Public employer organizations represented are as follows: Council of State Governments; International City Management Association; National Association of Counties; National Governors Association; National League of Cities; National Public Employer Labor Relations Association; National School Boards Association; and U.S. Conference of Mayors.

Union organizations represented are as follows: AFL-CIO Public Employee Department; American Federation of State, County and Municipal Employees; American Federation of Teachers; Communication Workers of America; International Association of Fire Fighters; International Federation of Professional and Technical Engineers; International Union of Operating Engineers; International Union of Police Associations; Labor's International Union of North America; and Service Employees International Union.

3. The states are Connecticut, Florida, Massachusetts, Michigan, Rhode Island, Washington, and Wisconsin.

4. State and Local Government Labor-Management Committee, *Statement of Purpose and Objectives* (Aug. 17, 1986) (newsletter on file at the Ohio State University College of Law Library).

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the initial period and cannot automatically supersede the collective bargaining agreements.<sup>5</sup>

The President of AFSCME has further stated, "there is really no alternative in our relationships with one another except labor-management cooperation."<sup>6</sup> He stated that governments and public sector unions "have the joint responsibility for making government work the best we can under very difficult circumstances."<sup>7</sup>

There seem to be several reasons why public employers and unions are looking for cooperative approaches. First, there is a recognition that productivity improvements and cost savings are important to the amount of funding available for other governmental purposes, including wages and fringe benefits. With many governments facing stout resistance to added taxation, the parties recognize that efficiency is an important variable in providing a fair compensation arrangement. Employers and unions are looking for ways to improve productivity and the quality of service, while at the same time improving conditions of work. Second, the work force is better educated than ever, and the parties have attempted to focus on how this greater education, ability and experience can best be utilized to improve the prospects of success for the governmental employer, the workforce, and the general public. Finally, in the last few years there has been a greater recognition of the importance of providing a humane working environment in which employees achieve greater work satisfaction and, therefore, life satisfaction from their jobs.

## II. VARIETIES OF LABOR-MANAGEMENT COOPERATION PROGRAMS IN STATE AND LOCAL GOVERNMENT

State and local governments have adopted a variety of labor-management cooperation programs, as will now be discussed.

### A. State Government

The State of New York has been a leader in establishing labor-management cooperation programs. Some programs seem to stem from the 1976 fiscal crisis in the state. Over the years, numerous labor-management committees have been established between the State of New York and its unions dealing with issues such as child care, health care, continuity of employment, work force planning, problems surrounding prisons, and many others. Both employer and union represen-

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5. *Text of Selected Resolutions Adopted by AFSCME Delegates*, 970 Gov't Empl. Rel. Rep. (BNA) 57 (July 12, 1982).

6. *NPELRA Conference Discusses Common Concerns of Labor and Management*, 22 Gov't Empl. Rel. Rep. (BNA) 566 (Mar. 19, 1984).

7. *Id.*

tatives regularly comment that these kinds of cooperative efforts make good sense.<sup>8</sup> For example, in 1979, a child care program was established in which the state set aside fifty thousand dollars, and labor-management committees met to work out a program for specific places. Now grants amount to twenty thousand dollars per center for the first year of operation, and there are twenty-five on-site centers throughout the state. According to the chief union representative, the feedback from the program has been very positive, and has led to improved morale and reduced absenteeism.<sup>9</sup>

The parties have also cooperated in the area of employee assistance programs (EAP) for substance abuse. EAP is called "the most successful project to date in reaching out to local membership" and is "joint in every sense of the word." Over two hundred joint programs are in place throughout the state.<sup>10</sup>

Health care cost containment also has proved a viable source for labor-management cooperation in New York. The state and its unions worked together to develop a sweeping new health plan to take effect in 1986; it is predicted to cut health insurance costs by one hundred and fifty million dollars over three years. At a recent conference, both labor and management representatives indicated they had no choice but to cooperate because of their mutual interest in keeping insurance costs down.<sup>11</sup>

The Commonwealth of Massachusetts is also making extensive use of labor-management committees. Governor Michael Dukakis has been emphasizing labor-management cooperation since taking office in early 1983.<sup>12</sup> Recent collective bargaining agreements include more than fifty joint labor-management committees, which address such issues as contracting out, training and career ladders, health and safety, child care, performance evaluation and employee participation.<sup>13</sup> A special commission on employee involvement has recommended that the state promote employee involvement in the public sector by further expanding and promoting employee involvement within state government; in cities and towns, through grants, sharing of information and resources, and support and monitoring; in schools and institutions of higher education

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8. *QWL Programs in New York Discussed by Panelists*, 24 Gov't Empl. Rel. Rep. (BNA) 786 (June 2, 1986).

9. *Id.*

10. *Id.*

11. *Joint Cooperation Held Key to Controlling Costs*, 25 Gov't Empl. Rel. Rep. (BNA) 826 (June 8, 1987).

12. Testimony of Daniel J. Sullivan, Director of the Office of Employee Relations, and Susan B. Levine, Coordinator of Statewide Quality of Work Life Programs, before the Massachusetts Special Commission on Employee Involvement and Ownership (Mar. 25, 1987).

13. *Id.*

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through grants and, interestingly, by adding employee representatives to the Boards of Trustees of higher education institutions, as well as the Board of Regents and school committees.<sup>14</sup>

In 1984, the first contract ever negotiated for a group of state employees in Ohio called for the formation of Labor-Management Committees, to discuss staffing patterns, health and safety, security, dress codes and other issues of mutual concern.<sup>15</sup>

A Wisconsin report recently recommended further labor management cooperation among state government employees and other public sector workers, stating:

The state as an employer can set an example for all public sector organizations by implementing labor-management cooperation processes within state agencies and departments. Already there are state government labor-management committees that are functioning effectively—notably within the Wisconsin Department of Industry, Labor and Human Relations and the Wisconsin Department of Health and Social Services. The Departments of Revenue and Employment Relations have also initiated quality improvement programs and participative management processes.<sup>16</sup>

The recommendation called labor-management cooperation an “important approach” for dealing with such problems as opening communication, eliminating red tape and layers of bureaucracy, improving cost effectiveness, and fully harnessing the skills of a diverse work force.<sup>17</sup>

Other states which have recently negotiated contracts calling for labor-management committees include Connecticut<sup>18</sup> and Iowa.<sup>19</sup> The Iowa provision is somewhat unique. It provides that recommendations of the committee involving health and safety items not acted on and that are non-economic may be submitted to binding arbitration, presumably under the state’s binding arbitration law.

### B. Local Government

Cities and unions across the land, from New York, New York, to

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14. SPECIAL COMMISSION ON EMPLOYEE INVOLVEMENT AND OWNERSHIP, MAKING A DIFFERENCE: EMPLOYEE INVOLVEMENT AND OWNERSHIP IN MASSACHUSETTS v-vi (June 1, 1987) (draft report).

15. *First Contract Between Ohio and UFCW Raises Liquor Clerk Pay 18% Over Term*, 24 Gov’t Empl. Rel. Rep. (BNA) 537 (Apr. 21, 1986). The contract is between the State of Ohio and the United Food and Commercial Workers (UFCW), covering 1,228 Ohio State Liquor Store clerks and lottery sales representatives. *Id.*

16. WISCONSIN DEPARTMENT OF DEVELOPMENT, LABOR-MANAGEMENT COOPERATION IN WISCONSIN 56 (1987).

17. *Id.*

18. *Agreement Between State of Connecticut and Health Care Employees*, 22 Gov’t Empl. Rel. Rep. (BNA) 1116 (June 4, 1984).

19. *Agreement Between State of Iowa and AFSCME*, 22 Gov’t Empl. Rel. Rep. (BNA) 369 (Feb. 20, 1984).

Kalamazoo, Michigan,<sup>20</sup> to Phoenix, Arizona,<sup>21</sup> to San Diego, California, are establishing labor-management cooperation programs. A recent report indicated that the San Diego Fire Department has adopted a participatory style of management, pushing decision making to the lowest possible level, and setting up problem-solving groups led by rank-and-file fire fighters. Through this process it has saved over \$367,000 and has handled four times as many fires, emergencies, and other community services without an increase in personnel. Both Union and management representatives highly praise the new arrangements.<sup>22</sup>

New York City has an active program of labor-management committees. "By 1986, about 1200 managers and union workers representing 75,000 employees in twelve different agencies were active participants in [more than 150] labor-management committees."<sup>23</sup> Eight unions participate.<sup>24</sup> The principles of the New York City program are as follows:

- (1). Each committee must have a formal, jointly agreed upon structure that identifies the membership and scope of activities. A committee's first action should be to define its own procedures.
- (2). Decisions should be reached through consensus, rather than by voting.
- (3). Committees should be co-chaired by labor and management representatives (joint chairing of a single meeting, not alternative chairs).
- (4). Management's co-chairperson should be in a position of sufficient operational authority to commit resources required to effect the solution of problems.
- (5). Management responsibility should rest with a position rather than with an individual in order to ensure continuity in the event of turnover.
- (6). Each committee should have high visibility throughout its unit, bureau, or agency.
- (7). Committees and subcommittees should meet regularly, at least on a monthly basis.
- (8). Membership in the LMC should be open to all unions in an agency, although participation should be voluntary.
- (9). Unions should be responsible for selecting their own representatives.

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20. *Agreement Between Kalamazoo, Michigan and AFSCME*, 21 Gov't Empl. Rel. Rep. (BNA) 1115 (May 23, 1983).

21. *Agreement Between Phoenix, Ariz., and Phoenix Law Enforcement Ass'n*, 22 Gov't Empl. Rel. Rep. (BNA) 95 (Jan. 9, 1984).

22. *Worker Participation Improves Morale, Productivity of San Diego Firefighters*, 25 Gov't Empl. Rel. Rep. (BNA) 966-67 (July 13, 1987).

23. OFFICE OF THE MAYOR AND THE MUNICIPAL LABOR COMMITTEE, LABOR-MANAGEMENT COOPERATION AND QUALITY OF WORK LIFE IN THE CITY OF NEW YORK 6 (1987).

24. *Id.* at 22.

(10). Committees should avoid discussing matters which are the subjects of collective bargaining or grievances.<sup>25</sup>

With respect to the New York City Program an outsider observed the following:

Among the issues that have been considered by participants are alternate work schedules (compressed work weeks, staggered or flexible working hours), which have proven effective in reducing absenteeism; employee recognition programs; work site improvement projects, which deal with factors other than safety, designed to improve productivity; and employee assistance programs.

Among the major achievements of the program . . . is a new citywide approach to computerizing payroll records, which has generated useful employment data and has reduced grievances over pay issues; the development of standards to govern subcontracting; and the creation of a health and accident information system to keep track of accidents and injuries on the job. Extensive training has also been conducted for employees.<sup>26</sup>

As one example of the many successes of such committees, city and union representatives reported that a committee implemented in the Sanitation Department produced changes in its first two years which permitted the Department to save about sixteen million dollars.<sup>27</sup>

The system is also being used in education. The Chicago Board of Education and the Chicago Teachers Union agreed to form a joint labor-management committee to consider educational reform issues, including teacher certification, preparation and recruitment; student expectations and effectiveness; teacher effectiveness, performance and evaluation; and the certification and training of school administrators.<sup>28</sup>

### C. Role of Labor Relations Agencies

There is a role for state labor relations agencies in encouraging labor-management committees or other forms of cooperation in state and local government. In New York, the New York Public Employee Relations

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25. *Id.* at 8.

26. C. GOLD, LABOR-MANAGEMENT COMMITTEES: CONFRONTATION, COOPTATION, OR COOPERATION? 39 (1986).

27. *Improved Productivity Attributed to Labor-Management Committee*, 24 Gov't Empl. Rel. Rep. (BNA) 785 (June 2, 1986). See also *Work Worth Doing*, (U.S. Dept. of Lab. Bureau of Labor-Management Relations and Cooperative Programs video documentary). This documentary includes the New York City Sanitation Department as one of its examples of the success of labor-management cooperation.

28. *Alternative Health Care Terms Accepted by Unions in Chicago*, 22 Gov't Empl. Rel. Rep. (BNA) 2339 (Dec. 31, 1984). The Labor-Management Committee remains intact following the 1987 strike. The committee continues to meet monthly, and "the strike did not affect the labor-management committee at all." Telephone interview with Chuck Burdeen, Communications Director, Chicago Teachers Union (Dec. 16, 1987). Other cooperative programs in education are discussed in *AFT Leader Says Cooperation Produces Fewer Fall Walkouts*, 25 Gov't Empl. Rel. Rep. (BNA) 1276-77 (Sept. 14, 1987).

Board (PERB) has been instrumental in establishing many labor-management committees in local government. Under the direction of Chairman Harold Newman, the New York Board in 1984 established a program promoting labor-management committees at the local government level. The program provides start-up money and a PERB facilitator for committees at the local government level. According to Chairman Newman, PERB received an "astounding" response across New York State to this program.<sup>29</sup> In 1986-87, the New York PERB continued its aggressive initiative to encourage the development of labor-management committees in local governments and school districts throughout the state. The program . . . has provided the parties with staff and panel facilitators and trainers, knowledgeable in the concepts of labor-management cooperation.<sup>30</sup>

The PERB program developed fourteen labor-management committees (LMC) in 1986-87, thirty-nine from 1984-87, and has a goal of twenty-five in 1987-88.<sup>31</sup> PERB also helped the parties maintain established labor-management committees by sponsoring conferences and conducting workshops and training programs to enhance skills of joint committee members in problem solving, decision-making and consensus building.<sup>32</sup> For the future, PERB expressed "a firm intention to continue support of the LMC program," calling it "an integral part of PERB's mission which is expected to have continued growth."<sup>33</sup>

The Wisconsin Employment Relations Commission (WERC) has also assisted in the development of labor-management cooperation. A recent report noted, "[i]n the past few years, WERC has provided information and assistance to workers and managers who are establishing labor-management cooperation arrangements. Most notably, in 1984 WERC commissioners participated as neutral parties in the formation of the Milwaukee Area Public Sector Labor-Management Council."<sup>34</sup>

The report further noted a limitation seemingly common to labor relations agencies, that WERC "does not have funding to provide seed money for support of labor-management cooperation programs nor does it have a mandate to provide staff dedicated to developing a statewide program."<sup>35</sup> The report recommended that WERC participate in a "network of labor-management technical assistance providers" which would

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29. *Joint Labor Management Committees Should Not Have Preconditions*, PERB Conference Told, 23 Gov't Empl. Rel. Rep. (BNA) 751 (May 20, 1985).

30. *Labor Management Committees*, 20 PERB News 8 (Apr. 1987).

31. *Id.*

32. *Id.*

33. *Id.*

34. WISCONSIN DEPARTMENT OF DEVELOPMENT, LABOR-MANAGEMENT COOPERATION IN WISCONSIN 38 (1987).

35. *Id.*



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“collaborate on educational activities, on research and on providing assistance to local labor-management efforts.”<sup>36</sup>

Also, the Federal Mediation and Conciliation Service (FMCS) has assisted state and local labor-management cooperative efforts, pursuant to the Labor-Management Cooperation Act of 1978.<sup>37</sup> In October 1987, the FMCS awarded “one million dollars in grants to support the operation of sixteen joint labor-management committees throughout the United States, including funding for three public sector projects.”<sup>38</sup>

### D. Summary

Labor-management cooperation programs have proved their worth for scores of public employers and unions, and for thousands of public employees across the country as well as the general public. The success of labor-management programs has been such that they cannot be dismissed as “gimmickry,” even though further study would help in determining the most effective methods of creating, implementing and maintaining such programs. Labor relations agencies can play an important role in encouraging cooperation, especially when specific funding is provided for this purpose.

## III. LEGAL IMPEDIMENTS TO LABOR-MANAGEMENT COOPERATION IN STATE AND LOCAL GOVERNMENT

Labor-management programs have proved their worth in many areas. However, questions exist as to whether there are legal impediments to creation or implementation of such programs.

### A. General

The reported labor-management cooperation programs appear almost exclusively in those jurisdictions which have comprehensive bargaining

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36. *Id.* at 54. Developments in Wisconsin were discussed at a workshop entitled “Labor-Management Cooperation in the Public Sector,” conducted as part of a “Wisconsin Conference on Labor-Management Cooperation” conducted on April 3, 1987, in Milwaukee, Wisconsin. (Audiotapes and handouts are on file at the University of Florida College of Law and are available through the Wisconsin Department of Development).

37. 29 U.S.C. § 175(a) (1982).

38. *FMCS Awards \$1 Million in Grants to Aid Labor Management Committees*, 25 Gov’t Empl. Rel. Rep. (BNA) 1497 (Oct. 26, 1987). The grants, awarded under the FMCS Labor-Management Cooperation Program, went both to new committees seeking federal assistance to help them get started and to older projects expanding into new areas. The three public-sector projects involved a hospital and several different hospital unions, the development of an employee assistance program and dispute resolution project in a city, and a labor-management project in a school system. The FMCS awarded its first Cooperation Program grants in fiscal year 1981, and has since funded eighty-nine labor-

laws, which now include about twenty-seven states and the District of Columbia.<sup>39</sup> It is reasonable to conclude that the creation and maintenance of such programs requires the existence of supportive legislation which encourages or requires collective bargaining. To the extent that the remaining states do not have such legislation, this gap obviously impedes the development of labor-management cooperation programs. Legal impediments exist, however, even in those states which have created a general right of collective bargaining.

### B. *Scope of Bargaining*

One example of a legal impediment to labor-management cooperation is the limited *scope* of bargaining allowed by some states. While some states have adopted the private sector standard, requiring bargaining over "wages, hours and other terms and conditions of employment,"<sup>40</sup> others have adopted a more restricted standard, either by legislation or judicial decision. A restricted standard may be imposed by only allowing bargaining on specific enumerated topics<sup>41</sup> or by legislation which contains a "management rights" clause which limits the scope of bargaining by explicitly reserving certain broad prerogatives to the employer.<sup>42</sup> Both

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management committees covering about four million employees represented by more than thirty national unions. *Id.*

39. The states are set forth in *AFL-CIO Public Employee Department Report Says Half of State and Local Employees Have No Bargaining Rights*, 25 Gov't Empl. Rel. Rep. (BNA) 407 (Mar. 23, 1987) (full statutory citations are set forth in Comment, *The Public Employee Labor Law in Missouri*, 51 MO. L. REV. 715, 740-41 n.194 (1986)). Such laws normally protect the right to organize of most public employees, establish a duty to bargain collectively, create an impasse resolution procedure, and provide for a labor agency to administer the law.

This study focused primarily on labor-management cooperation programs agreed to between governmental bodies and employee representatives. It does not appear from the literature or labor relations reporters that cooperative programs or other employee involvement mechanisms such as quality circles, gainsharing, and the like, are prevalent in non-union settings in state or local government, regardless of the presence or absence of a collective bargaining law.

40. 29 U.S.C. § 158(d) (1982). For state examples of scope-of-bargaining provisions similar to the federal standard, see, e.g., FLA. STAT. § 447.309 (1981 & Supp. 1988); MICH. COMP. LAWS ANN. § 423.215 (West 1978). For discussions of some limitations existing even under the federal standard, see Moberly, *New Directions in Worker Participation and Collective Bargaining*, 87 W. VA. L. REV. 765, 782-84 (1985), and Labor Department reports, *supra* note 1.

41. E.g., KAN. STAT. ANN. § 75-4327(b) (1984) which provides that the parties shall meet and confer in the determination of conditions of employment, which are defined in § 75-4322(t) to include "salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty, and grievance procedures." *Id.*

42. For example, the Iowa Statute provides:

Public employers shall have, in addition to all powers, duties, and rights established by constitutional provision statute, ordinance, charter, or special act, the exclusive power, duty, and the right to:

restrictions attempt to preserve the unilateral right of the employer to act in a wide number of areas which are otherwise commonly bargained about in both the public and private sectors, and which are also commonly dealt with by labor-management committees as described in Part I.

Some state courts have contributed to limiting the scope of bargaining by narrowly interpreting "conditions of employment" provisions or broadly construing statutory "management rights" provisions. For example, a New Jersey court held that when an issue primarily concerns a managerial prerogative, it is not negotiable even if it "may ultimately affect" working conditions.<sup>43</sup> A Pennsylvania court gave priority to the statute's management rights provision over the scope of bargaining provision and removed twenty-one commonly-negotiated items from the list of bargainable topics.<sup>44</sup> A Harvard Law Review study noted:

The judiciary's adherence to strict notions of managerial prerogative contravenes the legislative mandate underlying public sector bargaining statutes. Such statutes clearly represent at least a partial repudiation of the sanctity of the government employer's unilateral decision making power. Further, they reflect the underlying legislative judgment that labor peace—and therefore governmental efficiency—is best promoted by an effective collective bargaining system. By unduly deferring to managerial prerogative, courts may thwart the fulfillment of the legislative policy underlying the adoption of collective bargaining. When issues of fundamental concern to employees are removed from bargaining, labor strife becomes more likely; the consequent disruption of government operations subverts the very administrative efficiency that the management-rights limitation is aimed at protecting.<sup>45</sup>

It appears that labor-management cooperation programs are more extensive in states which have a broader definition of subjects of

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1. Direct the work of its public employees.
  2. Hire, promote, demote, transfer, assign, and retain public employees in positions within the public agency.
  3. Suspend or discharge public employees for proper cause.
  4. Maintain the efficiency of governmental operations.
  5. Relieve public employees from duties because of lack of work or for other legitimate reasons.
  6. Determine and implement methods, means, assignments and personnel by which the public employer's operations are to be conducted.
  7. Take such actions as may be necessary to carry out the mission of the public employer.
  8. Initiate, prepare, certify, and administer its budget.
  9. Exercise all powers and duties granted to the public employer by law.

IOWA CODE § 20.7 (1987).

43. *Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n*, 94 N.J. 9, 14-16, 462 A.2d 137, 140-41 (1983).

44. *Pennsylvania Labor Relations Bd. v. State College Area School Dist.*, 9 Pa. Commw. 229, 306 A.2d 404 (1973).

45. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1690 (1984).

bargaining, such as New York and Massachusetts. It seems likely that undue restrictions on the scope of bargaining discourage labor-management cooperation and reduce the effectiveness of the entire statute as a dispute settlement mechanism designed to encourage cooperation. As noted by the Harvard Law Review study cited above:

Legislatures and courts have developed a subjects-of-bargaining doctrine that unduly emphasizes the government's interest in preserving its traditional authority to make unilateral decisions on matters of public employment. Current limitations on the scope of bargaining both unnecessarily devalue the rights of public employees and undercut the public's interest in reducing labor strife through an effective system of labor relations.<sup>46</sup>

### C. Civil Service

A further impediment to labor-management cooperation may exist if overbroad civil service laws cover subjects which commonly are included in labor-management cooperation programs, such as employee training, job safety, attendance control, and other important areas of concern to the parties. In the event of a conflict between a civil service provision, usually established unilaterally, and a provision established by mutual agreement under a labor-management cooperation program or as part of a collective bargaining agreement, which would prevail? Some states provide that civil service laws or pre-existing laws take precedence over other laws.<sup>47</sup> Other states provide that the labor relations act or collective bargaining agreements take precedence over conflicting statutes.<sup>48</sup> A third alternative, utilized all too often, is for the legislature to ignore the problem altogether when it establishes the labor relations statute, thus deferring to the courts on the question of which law the legislature intended to be superior.<sup>49</sup>

The courts have varied considerably in determining whether mutual agreements or civil service provisions should prevail. One approach, adopted in Delaware, is to resolve any doubt in favor of the merit system.<sup>50</sup> The Iowa Supreme Court refused to enforce a contractual arbitration procedure for terminations, stating that terminations may be reviewed solely and exclusively through civil service appeal procedures.<sup>51</sup>

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46. *Id.* at 1683-84.

47. *E.g.*, DEL. CODE ANN. tit. 14, § 4013 (1981).

48. *E.g.*, CONN. GEN. STAT. ANN. § 7-474(f) (West 1972). This approach was recommended in CALIFORNIA ASSEMBLY ADVISORY COUNCIL, FINAL REPORT OF ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS 175 (1973). *See also* Helburn & Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LAB. L.J. 618 (1972); Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826 (1971).

49. *E.g.*, MICH. COMP. LAWS ANN. § 423.201-.216 (West Supp. 1988).

50. Laborers' Int'l Union, Local 1029 v. State, 310 A.2d 664, 667 (Del. Ch. 1973), *aff'd per curiam*, 314 A.2d 919 (Del. 1974).

51. Devine v. City of Des Moines, 366 N.W.2d 580, 582 (Iowa 1985).

In a Florida case, local civil service rules concerning holidays, funeral leave, seniority, and layoffs were held to prevail over negotiated collective bargaining provisions on those same subjects.<sup>52</sup> Such holdings necessarily have the effect of stifling, if not precluding, joint cooperative efforts to resolve issues of mutual concern.

A better approach has been developed by the Supreme Court of Michigan, as illustrated in the case of *Local 1383, Int'l Ass'n of Fire Fighters v. City of Warren*.<sup>53</sup> The City of Warren had a civil service merit promotional system for fire fighters and police officers, as authorized by state law. The City and Local 1383, representing Warren fire fighters, executed a collective bargaining agreement creating an exception to the civil service law. Promotions would be based on "seniority and reasonable qualifications as may be determined by the Fire Department after consultation with the Union." Subsequently, the Fire Commissioner informed the Civil Service Commission that, pursuant to the collective bargaining agreement, the Fire Department was in the process of qualifying persons for promotions and would submit a list of names from which the department would make promotions. The Civil Service Commission took the position that it was the body which determined qualifications for promotion under the civil service law.

The Michigan Supreme Court nicely posed the issue in the following way:

The question presented is whether a collective bargaining agreement's provision concerning promotions, which is entered into under the Public Employment Relations Act (PERA), is valid and enforceable when it conflicts with provisions of a city charter and the fire and police civil service act. . . .<sup>54</sup>

The court believed the critical question was "whether a normal and vital subject of bargaining can be removed from the public bargaining table by local charter provisions."<sup>55</sup> The court found it could not, holding the contract provision governing promotions valid and enforceable, notwithstanding conflicting provisions in the civil service law. The court concluded that collective negotiation was the proper procedure for determining employment conditions, and that the civil service law neither addressed nor focused upon a collective negotiation method. The court stated:

We are satisfied that the local civil service section of the Constitution was not intended to preclude the Legislature from enacting PERA to provide for free and full local collective bargaining, including the vital concerns of promotions and seniority. If this were not the case, PERA, a uniform state-

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52. Hillsborough County Aviation Auth. v. County Gov't Employees Ass'n, 482 So. 2d 505 (Fla. Dist. Ct. App. 1986).

53. 411 Mich. 642, 311 N.W.2d 702 (1981).

54. *Id.* at 649, 311 N.W.2d at 703.

55. *Id.* at 651, 311 N.W.2d at 704.

wide law, would be converted into a local-option law. Each locality would cut a wide swath in determining what would be a subject of bargaining in the heart of the bargaining process. In place of the specific exemption of only one group of public employees, the state classified civil service, numerous local public employers would be allowed to opt out of the scheme promulgated by PERA for the resolution of disputes involving mandatory subjects of bargaining, such as promotions and seniority. This would severely erode the sound policies which have led this Court to conclude that PERA and its constitutional source should be the dominant authority governing disputes concerning public employees.<sup>56</sup>

Similarly, the Florida Supreme Court has stated the issue as “whether a city which has established provisions for demotion and discharge of police officers in its civil service ordinance is required to bargain collectively on those issues to the extent of establishing, and being subject to, alternate grievance procedures.”<sup>57</sup> The court held in the affirmative, stating, “while the city has the authority to enact civil service ordinances, state statutes will take precedence over such ordinances where specific conflicts arise.”<sup>58</sup>

Clearly, those laws and judicial decisions which hold the collective bargaining process to have primacy over unilateral civil service systems will provide greater encouragement for the parties to enter into labor-management cooperation programs, which almost always are mutually determined. To the extent that a civil service system preempts subjects of labor-management programs, those programs will suffer or be non-existent. The difference between collective bargaining systems and civil service systems was explained by the Florida Public Employee Relations Commission, in concluding that the collective bargaining process should prevail over civil service systems, in determining conditions of employment. It stated:

This conclusion is consistent with certain basic differences between traditional notions of civil service laws and collective bargaining laws. Although both types of legislation have similar ultimate goals—*i.e.*, the improvement of the working conditions of the employees—the vehicles by which these similar goals are sought to be accomplished are very different. The differences stem largely from differences in the social philosophies which underlie each system. The philosophy behind the usual civil service law is that the government employer should, for a number of reasons, *unilaterally* determine what is good for its employees without employee participation in the decision-making process. The philosophy behind the usual collective bargaining law is quite different—it is founded on the notion that the employees at least know what they want (if not what is good for them) and that where there are options from which to choose the employees should be given a meaningful voice in the process of determining their own terms and conditions of employment.

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56. *Id.* at 667, 311 N.W.2d at 711.

57. *City of Casselberry v. Orange County Police*, 482 So. 2d 336, 337 (Fla. 1986).

58. *Id.* at 339.

The incompatibility of these two underlying philosophies is largely the reason for the frequent incompatibility of simultaneous operation of civil service systems and collective bargaining systems. While the two may abut each other, they generally will not successfully dovetail together. Rather, to the extent the two systems begin to overlap, one must take precedence over the other, and it appears that the people of the State of Florida through their adoption of the constitutional provisions discussed above and the Legislature of Florida through its adoption of Section 447.601, Florida Statutes (1979), have decided that such overlaps should be resolved in favor of collective bargaining.<sup>59</sup>

The Florida PERC was affirmed on appeal. The court noted that a contrary argument “overlooks the underlying reality that the School Board and its represented employees can never enter into a collective bargaining agreement which contains any provision of which the Civil Service Board disapproves”<sup>60</sup> and that such a view would “operate as a wholesale impediment to collective bargaining.”<sup>61</sup> Accordingly, the court concluded that the collective bargaining law prevailed over the civil service provisions.<sup>62</sup> This sort of construction is most consistent with the goal of encouraging labor-management cooperation and removing impediments.

#### D. *Yeshiva in the Public Sector*

In *U.S. Labor Law and the Future of Labor-Management Cooperation*,<sup>63</sup> *NLRB v. Yeshiva Univ.*<sup>64</sup> was sharply criticized. In that case, the U.S. Supreme Court held that faculty members were substantially operating Yeshiva University and were therefore managerial employees who could be denied collective bargaining rights under the National Labor Relations Act, as amended. The Labor Department report criticized *Yeshiva* because it “jeopardized the desired method of operation in an ideal employee/employer participation plan, and, if extended, could potentially cast doubt upon the most innovative features” of various cooperative arrangements in the private sector.<sup>65</sup> Furthermore, said the

59. *Hotel Employees Union, Local 737 v. Escambia County School Bd.*, 7 Fla. Pub. Empl. Rep. (Labor Relations Press) ¶ 12,395, at 871 (1971), *aff'd.*, 426 So. 2d 1017 (Fla. Dist. Ct. App. 1983). *But see* *Pinellas County Police Benevolent Ass'n v. Hillsborough County Aviation Auth.*, 347 So. 2d 801 (Fla. Dist. Ct. App. 1977), and *Hillsborough County Aviation Auth. v. County Gov't Employees Ass'n*, 482 So. 2d 505 (Fla. Dist. Ct. App. 1986).

60. *Hotel Employees Union, Local 737 v. Escambia County School Bd.*, 426 So. 2d 1017, 1019 (Fla. Dist. Ct. App. 1983).

61. *Id.*

62. *Id.* at 1018-19.

63. BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEPT. OF LABOR, *U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION* 11 (BLMR 104, 1986).

64. 444 U.S. 672 (1980).

65. U.S. DEPT. OF LABOR, *supra* note 63, at 14.

report, "employees will hardly be encouraged to participate in cooperative efforts with management if doing so will result in their exclusion from the bargaining unit."<sup>66</sup>

The question is raised as to what extent states have applied *Yeshiva* to public sector employers. Most states which have considered the question have rejected the *Yeshiva* outcome. Relatively new laws, such as in Illinois<sup>67</sup> and Ohio,<sup>68</sup> expressly provide for faculty coverage at state universities. State labor agencies generally have interpreted state laws to include faculty as protected under those laws, such as in Alaska,<sup>69</sup> California,<sup>70</sup> Kansas,<sup>71</sup> and Oregon.<sup>72</sup> Only one case was located which followed *Yeshiva*.<sup>73</sup> Thus it appears that most states recognize that an overbroad definition of managerial employee would operate to deprive employees of collective bargaining rights or would tend to inhibit employees from extensive participation in the operation of the enterprise.

### E. Other Areas

Many other areas were investigated and reviewed, but were found not to constitute legal impediments to labor-management cooperation. For example, many kinds of impasse resolution procedures are available in different states. About eleven states allow a limited right to strike, while the remaining states prohibit strikes;<sup>74</sup> about twenty states provide for final and binding interest arbitration for at least some types of employees to resolve disputes over the terms of new collective bargaining agreements,<sup>75</sup> and many others provide for non-binding fact-finding. There was no evidence, however, that any of these laws would impede labor-management cooperation among parties willing to enter into cooperative arrangements.

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66. *Id.* at 15.

67. ILL. ANN. STAT., ch. 48, ¶ 1701-1721 (Smith-Hurd 1986).

68. OHIO REV. CODE ANN. § 4117.01(f)(3) & (k) (Baldwin 1987).

69. *University of Ala. v. Associated Faculty Univ. of Ala.*, No. UA-80-2 (Ala. Lab. Rel. Bd. 1981).

70. *State of California Decision of the Public Employment Relations Board*, 932 Gov't Empl. Rel. Rep. (BNA) 44 (Oct. 5, 1981).

71. *Kansas Higher Educ. Ass'n v. Wichita St. Univ.*, No. 75-UD-1-1980 (Kan. Pub. Empl. Rel. Bd. 1981).

72. *Southern Or. St. Col. v. Association of Profs.*, No. C-176-82 (Empl. Rel. Bd. Or. 1985).

73. This was a hearing officer's report in *Univ. of Pitt.*, No. PERA-R-84-53 W (Pa. Lab. Rel. Bd. 1987).

74. The status of strikes is thoroughly discussed in *County Sanitation Dist. v. Los Angeles County Employees Ass'n*, Local 660, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, cert. denied, 474 U.S. 995 (1985).

75. The states are set forth in Anderson, *Presenting an Interest Arbitration Case: An Arbitrator's View*, 1986 Rep. of the Comm. on State & Local Gov't, ABA Sec. Lab. & Empl. L., app. B.



In the area of union security, the same is true. Various states allow the union shop (five states), maintenance of membership agreements (seven states), and agency shop or fair share arrangements (at least seventeen states); about twenty-one states have adopted "right-to-work" laws which prohibit the negotiation of union security clauses.<sup>76</sup> None of the above-described arrangements seems to legally impede labor-management cooperation programs as described in Part I, and in fact such programs do exist in states having each type of arrangement.

Generally, there are no serious legal obstacles to allowing representatives to participate in labor-management cooperation programs on official time. In fact, contracts commonly provide, "Union representatives will be in pay status for all time spent in labor-management meetings which are held during their regularly scheduled hours of employment,"<sup>77</sup> or "employees shall suffer no loss of regular pay or benefits as a result of participation in committee activities."<sup>78</sup>

There was also no instance discovered where a governmental body, by participating in a labor-management cooperation program, was found to have engaged in an unlawful bypass of the exclusive representative. Moreover, there was no evidence that the remedies for unfair labor practices, or the lack thereof, had any relationship to the creation or maintenance of labor-management programs. In one case, it was found that a union's participation on a labor-management committee "did not evince acceptance of the Authority's unilateral changes through waiver by inaction," and Management was ordered to rescind the changes.<sup>79</sup> In another case, the employer unilaterally imposed a no-smoking rule without first submitting the issue to a labor-management safety committee; the arbitrator found a violation and ordered that the issue be submitted to the safety committee.<sup>80</sup> In both of these instances the remedy seems adequate to deal with the violation.

Finally, there was no evidence that state laws unduly restrict information so as to impede labor-management programs. Generally, information is much more available in the public sector than in the private sector. Governmental budgets, accounts, books, *et cetera* are open documents. Many states have express and wide-ranging open-record laws. In addition, most collective bargaining laws include a duty to provide

76. Descriptions of the basic types of union security arrangements, as well as the states which have adopted them, are set forth in H. EDWARDS, R. CLARK, JR. & C. CRAVER, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 471-531 (3d ed. 1985).

77. *Agreement Between State of Iowa and AFSCME*, 22 Gov't Empl. Rel. Rep. (BNA) 369, 384 (Feb. 20, 1984).

78. *Agreement Between State of Connecticut and Health Care Employees*, 22 Gov't Empl. Rel. Rep. (BNA) 1116, 1136 (June 4, 1984).

79. *Amalgamated Transit Union v. Orange-Seminole-Osceola Transit Authority*, 11 Fla. Pub. Empl. Rel. Comm'n ¶ 16,241, No. CA-85-022, 85U-209 (1985).

80. *H-N Advertising & Display Co.*, 88 Lab. Arb. (BNA) 329 (1986) (Heekin, Arb.).

information necessary for collective bargaining<sup>81</sup> and contract administration.<sup>82</sup>

#### IV. SUMMARY AND CONCLUSIONS

State and local governments, as well as unions representing governmental employees, have become increasingly active in establishing labor-management cooperation programs. National organizations representing these groups also cooperate at the national level to encourage these developments. The reasons for adopting or encouraging labor-management cooperation programs are diverse, but they include cost savings, improved quality of service, improved productivity, improved conditions of work, greater utilization of employee education and talents, and greater work satisfaction. Labor relations agencies can play an important role in encouraging cooperation, especially when specific funding is provided for this purpose.

Despite the many successes, there are some legal impediments to the creation and development of labor-management programs in state and local government. One such impediment, present in just under one-half of the states, is the lack of a comprehensive labor relations law which establishes a right to collective bargaining. Most of the reported labor-management cooperation programs exist in states which have established such a law. Such a law seems to be a prerequisite for the creation of a climate in which mutual cooperation and respect, essential for the success of such programs, will thrive.

Some states impede labor-management cooperation by excessively limiting the *scope* of collective bargaining. Some impede mutual cooperation by allowing unilateral civil service systems to unnecessarily restrict collective bargaining efforts. Other states, more consistently with cooperative efforts, apply a broader scope of bargaining and enforce collective bargaining laws and agreements over conflicting civil service regulations.

Most states have wisely rejected the rationale of the United States Supreme Court in the *Yeshiva* decision, which applied an overbroad definition of managerial employee so as to exclude college faculty from organizational and bargaining rights. Adoption of *Yeshiva* by the states would either inhibit extensive employee participation in government, or would deprive employees of collective bargaining rights. Moreover, many other laws which are unique to the public sector, from impasse resolution procedures to information availability, do not constitute legal impediments to labor-management cooperation.

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81. *E.g.*, *City of Hartford v. Local 760, Int'l Ass'n of Fire Fighters*, 24 Gov't Empl. Rel. Rep. (BNA) 780 (1986).

82. *E.g.*, *Michigan St. Univ. v. Clerical-Technical Union of Mich. St. Univ.*, 24 Gov't Empl. Rel. Rep. (BNA) 1286 (1986).